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Foot Notes.

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## **THE NOTION OF 'EUROPEAN UNION'**

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Understanding the European experience is a matter of great importance. For the Europeans, uniquely, can freely declare: "We the peoples of the European Union"; indeed, they have experienced the sense of union, from the embryonic French-German form to the developed entity it has become. For how is it possible that the American Constitutional Convention created the basic law in Philadelphia in 1789 for a nation that did not yet exist? And how is it possible that the Charter of the 'United' nations was shaped at the Congress of nations in San Francisco in 1945, for a world nation that did not yet exist? The unification of the World, be it presented under the guise of globalization or democratization, must be modeled on the European experience. Experiencing the sense of a world union should pave the way for 'the peoples of the United Nations' to declare a 'United Nations'.

### **INTRODUCTION**

1. The inclination to form a union belongs by nature to all states. For just as in order for a part to be considered perfect it must be united to its whole, so

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every state finds its completion by its place within its united whole. An example of this is the inclination of the European states to form a single Union amongst themselves. The fact that the history of Europe displays rather differences<sup>1</sup> than

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- 1- The differences that had divided Europe have been mainly of economic and political nature. Economically, differences started during late nineteenth century to early twentieth century with European States like Great Britain, Germany, France, and others, racing to a thrilling monopolization in the external market. Politically, differences started with the emergence of competing ideologies, such as liberal democracy, Nazism, and Fascism. Dividing Europe for at least half century, both economic and political differences have led to tensions, conflicts and wars, which stimulated interests in coming to arrangements over some common ground. Now, since the European differences have been of economic and political order, these arrangements have also been of economic and political order. Thus, in order to understand the European Union, we should bring into sharp focus those differences that led to tensions, conflicts and wars in the European Continent, promoting new arrangements for their resolution.

**A. Economic Differences:** Competition for economic power and prestige among the emerging economic powers, namely, Germany, France, and Italy, and Great Britain, the then only predominant economic force, led to Imperialist Activity and the Alliance System which divided Europe into armed camps, resulting in a series of crises, and ultimately leading to the First World War.

**1. Economic Differences as Source of Tension in Europe:** It was not until the late years of the nineteenth century and early twentieth century that Germany, France, and Italy, challenged Great Britain's economic leadership. During the 1870s, the European powers developed a new interest in overseas expansion. In Great Britain, the acquisition of additional colonies became an object of government policy and won wide support among the public. France achieved a measure of domestic political stability under the Third Republic, and began to look outward. In Germany and Italy which had recently achieved their national unification regarded imperial expansion as evidence of national greatness. A number of factors contributed to the drive for imperialism in the final decades of the nineteenth century. The growth of European industry led to demands for new sources of raw materials, as well as to a need for new markets for the products of industry. This imperial expansion provided a dramatic manifestation of Europe's power and dynamism. As the imperialist powers increased their activity, rivalries intensified, increasing tensions among the powers.

**2. Tensions as Source of Conflict in Europe:** The European international relations centered during the 1870s and 1880s around Otto von Bismarck, Germany's chancellor. During these decades, Germany held sway over the European political power, establishing close ties with Austria-Hungary, Russia, and Italy (The Triple Alliance). Following Bismarck's removal from office in 1890, the balance of power swung in France's favor, opening the way for the Franco-Russian rapprochement in 1894, and the Anglo-French Entente a decade later (The Triple Entente). As the alliance system propelled imperialistic interests in monopolizing external market, and divided Europe into armed camps, a series of

international crises in the early years of the twentieth century moved the powers closer to the First World War.

But economic differences were not the only factors that led to tensions and conflicts in the European Continent. Political differences have also contributed to that effect.

**B. Political Differences:** Political differences which led to tensions, conflicts and wars in Europe can be observed at the "community" and the "state" level.

### 1. Political Differences at the "Community" Level

**a. Linguistic Differences:** Linguistic differences among communities have always existed throughout Europe. Fifteen linguistic communities in Italy, five at least in France, three in Belgium (French, Dutch, German), three in Austria (German, Croat, Slovene), let alone Switzerland, where 75% of the population belong to the German linguistic community, 20% to the French linguistic community, 4% to the Italian linguistic community, and 1% to the Romansh linguistic community.

Linguistic differences among communities were a source of tensions and conflicts in the European Continent. The 1919 Paris Peace Conference following the World War I established a Minority Treaties System by which a number of States in Central and Eastern Europe undertook specific obligations concerning the protection of, inter alia, linguistic minorities, and these obligations were placed under the guarantee of the League of Nations. The establishment of a Minority Treaties System implies that the origin of First World War may be attributed to differences among communities in Europe. This fact was again repeated during the Second World War, where the protection of the German-speaking minorities throughout Europe provided an excuse for Germany's expansionist policy.

In addition to linguistic differences, religious community differences also existed throughout the European Continent.

### b. Religious Differences

**i. Religious Differences as Source of Tension:** During the first half of the sixteenth century, and the seventeenth century, the unity of medieval Christendom shattered as dissenting Christian groups in Germany, England, Netherlands, and others, rejected the authority of the Church of Rome. This reform movement has engendered at least thirteen religious communities, namely, Lutherans, Calvinists, Anglicans, Puritans, Quakers, Baptists, Unitarians, Pietists, Congregationalists, Methodists, Gallicanists, Ultramontanists, Jansenists, and Quietists. By 1560, the religious realignment of Europe was essentially complete. England, Scotland, Northern Ireland, Holland, northern Germany, parts of Switzerland, and Scandinavia, were overwhelmingly Protestant; while Italy, Spain, southern Germany and Eastern Europe, were mainly Catholic. This division along religious lines boded ill for the peace of Europe; for the spread of Protestantism created social and political tensions that sparked a century of bitter strife.

**ii. Religious Differences as Source of Conflict:** The religious differences among groups engendered by the Protestant Reformation caused much turmoil during this period. France, Spain, and the Netherlands, were engaged in religious warfare during the second half of the sixteenth century. Harpsburg attempts to eradicate Protestantism led to the Thirty Years' War. Following the First World War, it was recognized early in the course

of the Peace Conference that assurances for the protection of religious minorities must be given as one of the essential conditions for a peace settlement. In fact, the Minority Treaties System was established with a view to prevent the possibility of a new war, acknowledging thus that religious differences were fertile sources of the First World War.

**b. National Differences:** National groups have also existed throughout European Continent. In Central Europe, nationalism was the most powerful ideology in the early nineteenth century. In his treatise *Ideas on the philosophy of the History of Humanity* (1784-1791), J.G. VON HERDER (1744-1803) defined nationalism in terms of a people's language, literature, and history, which gave them a sense of identity.

**i. National Differences as Source of Tension:** Nationalism had dangerous political implications. The Hapsburg Empire was a multinational State, inhabited by Germans, Magyars (Hungarians), Poles, Lutherans (Ukrainians), Czechs, Slovaks, Rumanians, Serbs, Croats, Slovenes, and others. and an and history, they also come to desire a state of their own. Nationalism promoted the disintegration of the Austrian Empire, as the various subject peoples of the Hapsburg emperor came to acquire appreciation of their language and literature, and their own historical consciousness.

**ii. National differences as Source of Conflict:** In 1848, widespread and growing discontent resulted in a wave of revolutions in Europe. Although defeated, the revolutionary ideas of liberation and nationalism lived on. Italy was united in 1861. Hungary gained the right to self-government in 1867, and a united German Empire was proclaimed in 1871.

**2. Political Differences at the "State" Level:** The ideological orientations of European governments aggravated the linguistic, religious, and national differences even further. During the late years of the nineteenth century, and the early years of the twentieth century, autocracy opposed other more liberal orientations.

**a. Autocracy v. Democracy:** In the late nineteenth century, there were two opposing forces: Autocracy and democracy. Authoritarianism in Germany, the Austrian Empire, and Russia resisted change for democracy. During the period prior to the outbreak of World War I in 1914, Germany's rulers refused to consider any real democratization of the country's political system. In the Austrian Empire, Emperor Francis Joseph was forced to make concessions to the Magyars of Hungary. The desires of other nationalities remained unsatisfied, however, and their intensifying nationalism challenged both Francis Joseph's control of Austria and the Magyars' domination of Hungary. In Russia, the tsarist autocracy appeared to be in firm control. While Alexander II abolished serfdom and introduced other reforms, his successors were totally committed to reactionary principles. A small but growing number of middle-class intellectuals embraced liberal or socialist ideas, however, and Russia's defeat by Japan resulted in the Revolution of 1905, which led to the establishment of an elected parliament.

On the other hand, the cause of democracy advanced in Great Britain, France, and Italy. In Britain, the Reform Bill of 1832 marked a decisive step in the shift of political power from the landed aristocracy to the middle class, by redistributing seats in the House of Commons and granting the right to vote most adult middle-class males; the Reform Bill of 1867

extended the right to vote to most of Great Britain's urban workers; the Education Bill of 1870 provided financial support to local school boards to operate free non-sectarianism elementary schools; the Ballot Act of 1872 introduced the secret ballot in British elections, and the Reform Bill of 1884 extended the right to vote to most farm workers. In France, following the overthrow of Napoleon III in 1870, the democratic Third Republic was established. France remained a deeply divided nation, however; for monarchists and clericals rejected the Republic, and France's political leaders were slow to enact economic and social reforms to meet the needs of the working masses. Italy lagged considerably behind Great Britain and France in advancing the cause of democracy. In the years following the achievement of unification in 1861, political power was the monopoly of an upper-middle-class and upper-class oligarchy, and universal manhood suffrage was not established until 1912.

**b. Ideology v. Democracy:** In the inter-war period, parliamentary democracy was also attacked by ideological orientations like fascism in Italy in 1922, and Nazism in Germany in 1933.

**i. Fascism v. Democracy:** Although fascism offered little in the way of a firm ideology or definite program, it did possess certain distinct characteristics. Fascism was intensely nationalistic, militaristic. It was anti-Marxist with its emphasis on the class struggle as an inherent force in national life. Fascism was also anti-liberal democracy, emphasizing the obligation of the individual to serve the state rather than the freedom of the individual. Under Fascism Press censorship was tightened. All elected local government officials were replaced by Podestas, who were appointed by the central government. Fascist economic policy emphasized regimentation, with strict controls over the economy, while at the same time the interests of the capitalists were protected.

**ii. Nazism v. Democracy:** Similarly, Nazism denounced liberal democracy in many ways. Opposition political parties were eliminated in the Spring of 1933. And in May 1933, the Nazis moved to abolish independent labor unions. The word "socialist" in the name of the Nazi Party did not refer to the nationalization of the means of production but to requiring the economy to serve the interests of the state.

The fear of governments with liberal tendencies, like France and Great Britain, from the rise of governments with ideological orientation, like Nazism and fascism, contributed to tensions in European international relations. In their effort to quench this fear, a new system of alliances, similar in substance to that of the pre-First World War, was to be established. The French search for security in the face of a possible German resurgence was the central issue in European international relation during the 1920s. In their pursuit of security, the French established a new system of alliances signing treaties with Belgium in 1920, and Poland in 1921. A downturn in European international relations began soon after Adolf Hitler came to power in Germany in January 1933. Charging that the Treaty of Versailles had been unduly harsh on Germany, Hitler withdrew Germany from both the League of Nations and the Geneva Disarmament Conference in October 1933. The attempted Nazi coup in Austria in July 1934, and the German rearmament in March 1935 met remarkably little resistance from France and Great Britain. In fact, both western democracies intense memories of the carnage of World War I created a powerful interest in avoiding another

union does not exclude the fact that the inclination to form a union among themselves has always belonged to Europeans. For although European economic and political arrangements appeared to be late in European history, they do reflect the culmination of a long-established European struggle in spite of all obstacles and wars to get together and meet common understandings to apparently unresolved relational issues.

2. The establishment of the European Union<sup>2</sup> has brought into being a new legal order whose task is to promote integration, by introducing in the Member States uniform rules, leading ultimately to a union of the European States and peoples. This task has been pursued at different levels, economically by breaking down the barriers to trade between States; financially, by creating a single currency; politically, by creating a single Union Citizenship; legally by providing uniform interpretation to European Union law, and nationally by requiring courts to interpret all national laws in the light of relevant European Union laws. The European Union legal order reflects then on the laws pertaining to the European Union integration process.

3. On the other hand, the establishment of the European Union has brought into being a new legal order in which the Member States relinquish their powers

conflict, boring the primary responsibility for maintaining the post-World War I peace settlement.

Thus, Europe has always been divided by differences, and a great variety of these differences led to tensions and conflicts, that Europeans tried to resolve, first, by confrontation (the two great wars), then gradually by "cooperation" and "integration", ultimately by forming a single "Union."

- 2- The characteristics of the Treaty on European Union can be summarized as follows: First, it modifies each of the Founding Treaties which instituted the ECSC, the EEC, and the EURATOM. Second, the term "European Economic Community" in the Treaty of Rome was replaced by the term "European Community" (EC); and third, it contains autonomous provisions which establish a European Union that is "founded on the European Communities, supplemented by the policies and forms of co-operating established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member states and between their people." (Article A, Common Provisions). Article C of the Common Provisions, states that "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*." It is also said that the Union is of "three pillars," the "Community pillars" whose competencies have been extended, and the "intergovernmental pillars," governing the Common Foreign and security Policy (CFSP) on the one hand, and the Co-operation in the Fields of Justice and Home Affairs (CFJHA) on the other hand.

to the European Union, and whose laws give rise to rights and duties to individuals before national courts. This indicates the existence of an autonomous legal order, and is manifest in the unity of the European Union making reference to the same institutions to attain its integrative objectives. Thus, the European Union legal order points out also to the laws pertaining to the European Union's autonomous entity.

4. Thus, the originality of the European Union legal order lies not in creating a unique entity existing outside the Member States, rather in being an integral part of the legal orders of the Member States.

### A. The Concept of "European Union"

5. There are treaties which conceived the European Union as a process, where the *acquis communautaire* is preserved, and in several important respects, extended and strengthened.<sup>3</sup> On the other hand, there are treaties which

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3- The repeatedly affirmed hypothesis of a European Union conceived as a process has been the trend that Europeans have usually followed. The first attempt goes back to the European Political Community adopted in March 1953 by the ad hoc Assembly of the European Coal and Steel Community, in application of Article 38 of the Treaty on the European Defense Community that was signed by the Six Founding States (France, West Germany, Benelux, and Italy) on May 30, 1952. The project provides for an institutional structure endowed with supranational powers in foreign affairs and defense, and in social and economic matters. It, however, had the same fate as that of the European Defense Community to which the European Political Community was attached. The project became null and void at the time the European Defense Community was rejected after the French National Assembly refused to ratify it on August 30, 1954. Another effort was made by Europeans to institute a Union among themselves. During the Summit of Paris of October 21-22, 1972, the Member States declared their will to transform all their economic and political relations by 1980 into a European Union. This will, however, did not take form, nor did the nine States (the original Six, plus the United Kingdom, Ireland, and Denmark) provide for a definition of their European Union. Nevertheless, they invited the institutions (the Commission, the Parliament, the Court of Justice, and the Economic and Social Committee) of the Community to elaborate reports on the topic. In this line of thought, the Summit of Paris of December 10-11, 1974, entrusted the Belgian Prime Minister Tindemans with the task of writing up a report on the content of the European Union, and on the means of realizing it. The Tindemans Report, submitted on December 29, 1975, includes a number of propositions aiming at furthering the internal and external cohesion of the European Community (See VII General Report on the Activities of European Communities (1974) at 332). It takes the existing institutions as a basis, with the main object of strengthening them (direct election of the Parliament, or grant of legislative initiative to the Parliament), and combating the intergovernmental decision-making structure in them (by, for example,



conceived the European Union as an entity, where European Communities are fused into one single Union.<sup>4</sup> Still, the Maastricht Treaty on European Union of 1992 conceived the European Union as both a process and an entity,<sup>5</sup> but was

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instituting majority vote in the Council). The Tindemans report proposes also to the Member States to transform progressively their Political Co-operation into a Common External Politics. Contrary to the Political Co-operation, where decisions must be reached unanimously, in Common External Politics decisions must be reached commonly, with minority views joining majority views at the conclusion of debates. The attempt made by Tindemans Report has received the same fate as the previous European attempts. The hypothesis of establishing a European Union, as instituted by Tindemans Report, which was several times at the European Council agenda without avail, was again rejected. Conceiving a European Union as a "process" was also pursued by the Solemn Declaration on European Union adopted by the European Council of Stuttgart on June 19, 1983, inspired by a joint initiative made by the ministers of Foreign Affairs of Germany and Italy ('The Gensher-Colombo Initiative'). According to this initiative, "the European Union is realized by deepening and extending the scope of European activities as to cover in a coherent way the relations between the Member States and their external relations." Following this line of thought, originated by the Gensher-Colombo Initiative, the Twelve Governments adopted the Single European Act of February 1986, stressing their will "to pursue the task undertaken by the creation of the treaties instituting the European Communities, and transform all the relations between their States into a European Union." The Single European Act has made important amendments to the Founding Treaties. It has also contained provisions that are foreign to them, like, for example, the "Provisions on European co-operation, relating to foreign politics" (Article 1 of the Single European Act states that "the European Communities and the European political co-operation have as object to contribute together to the progress of the European Union."). Important as it was in approximating economic differences among Europeans, the Single European Act stopped, however, short from formally instituting a European Union.

- 4- Only the European Parliament Project has opened a new direction in the effort of establishing a European Union. For, contrary to the previous attempts, the European Parliament Project Treaty conceived the European Union as a unique entity that replaces the existing Communities. Elaborating a European Constitution in 87 Articles, the Project Treaty on the European Union of February 14, 1984, substitutes the three Communities for a unique entity - the Union - whose competence was extended to foreign and defense policies. It also introduced reformation in the institutions, like the grant of the co-decision procedure to the Parliament, and the establishment of European Council as an institution.
- 5- The Maastricht Treaty comes in between Tindemans' report and the European Parliament's Project. On the one hand, "the Union [is] founded on the European Communities, supplemented by the policies and forms of co-operating established by this Treaty" (Article A, para. 3, Common Provisions of the Treaty on European Union). On the other hand, the Union although conceived as a separate political entity, does not eliminate the European Communities by replacing them. Its task is only limited "to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between

short of formally incorporating all the principles that the European Court of Justice had introduced, such as the principle of direct effect and of supremacy of the European Union laws. This task was accomplished by the Constitutional Treaty of 2004.

### 1. Definition of "European Union"

6. No treaty on European Union has provided the perplexed European citizen with a definition of the European Union. Most European Union scholars consider that this entity means an international organization. Now, an organization is commonly defined as an (a) association of States, (b) established by a treaty between two or more States, and (c) whose functions transcend the national boundaries of the Member States (See R. Bledsoe & B Boczek, *The International Law Dictionary* (ABC-CLIO: California & Oxford, 1987) at 75-76). But, the European Union is clearly (a) an association of States, (b) formally established by the Treaty of Maastricht, and its (c) functions transcend the national boundaries of its Member States; witness the objectives set under Title I of Part I of the Constitutional Treaty and under Article B of the Common Provisions of the Treaty on European Union. Accordingly, the European Union is an international organization.

7. But public international organizations are, generally, considered to be subjects of international law, as are States, even though their legal personality is not comparable to that of the States establishing them, the legal personality of international organizations being limited to the specific rights and duties outlined in the Treaty establishing them.

8. There is no question that the Constitutional Treaty endowed the European Union with a legal personality.<sup>6</sup> It does not, however, characterize the

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their peoples." But if the Union is conceived in its process, how can it possibly be also conceived as being an entity, a single whole? In order for union to form a single whole, it should not be conceived as being one of its components to the exclusion of the others. Now the unity of the European Union is ensured since reference is made to the same institutions to carry out the Union's activities: Article C, para. 1, Common Provisions of the Treaty on European Union, states that "The Union [is] served by a single institutional framework which...ensures the consistency and the continuity of the activities carried out in order to attain its objectives..." Therefore, the European Union can also be conceived as a single whole.

6- Article I-7 of the Constitutional Treaty states that "The Union shall have legal personality." The Constitutional Treaty fused the two intergovernmental pillars of the European Union

nature of the Union's legal personality. Since the Constitutional Treaty merged the European Community with the European Union, and the European Community was endowed with legal personality, and the European Union's legal personality is explicitly recognized under the Constitutional Treaty, it is possible then to draw an analogy between the legal personality of the European Community and that of the European Union.

9. It might be argued that the Union has only internal legal personality, because of the lack of an express reference to an international personality attributed to the Union by the Constitutional Treaty. On the other hand, it might be argued that the Union has an international legal personality. For the European Court of Justice had clearly stated, with regard to the Community that

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into the European Community, and merged the European Community with the European Union. Now the European Community had expressly been endowed with a legal personality under the Founding Treaties which were maintained by the Treaty on European Union. Therefore, a formal recognition of the Union's legal personality was needed, which the Constitutional Treaty did.

An argument with a backward glance is useful in this regard: The lack of an explicit recognition by the Maastricht Treaty on European Union of the Union's legal personality does not necessarily exclude it. For it is possible, according to the rulings of the European Court of Justice and of the International Court of Justice, to infer such a personality from other provisions. In the *Reparation for Injuries Suffered in the Service of the United Nations* case, the International Court of Justice stated in its advisory opinion (ICJ Reports, 1949), where the United Nations Charter did not contain any explicit provision on the legal personality of the Organization, that "the rights and duties of an entity such as the Organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice." Now, some scholars claim that it is possible to implicitly infer the legal personality of the European Union from that of the European Communities. In fact, it is clearly understood from the Treaty on European Union that the Union does not replace the European Communities. Article A(3) of the Treaty on European Union, by stating that the Union is founded on the European Communities, considers, to the contrary, that the Communities are preserved, whose treaties are modified by the Treaty on European Union. The legal personality of the European Communities then is maintained; and it is through these Communities that the European Union's activities are realized. This argument, however, appears to be brittle. For if the Union's legal personality should only be found through that of the European Communities, it is then incomprehensible why the Treaty on European Union had established the Union as an entity. The Maastricht Treaty on European Union could have limited its task to strengthen and modify the *acquis communautaire* with no need to create any new entity. By conferring a separate legal personality to the Union, the Constitutional Treaty comes, therefore, as a decisive step in this regard.

the concept of legal personality expressly mentioned by the Founding Treaties included that of international personality. It might still be argued that the Union possesses a Union legal personality where its decisions do not only affect Member States but also the particulars belonging to the Member States.

The argument of the Union legal personality would state that the Union possesses the powers and competences that habitually belong to States or moral persons under public law, such as the power to enact legislations, to have agents, etc. (*See*, by analogy, ECOJ, 15 Jul.1960, Lechmüller, Rec. 953). This means that, in addition to the powers that put the Union Institutions in relation to Member States, the Union would have especially the powers that could affect directly the citizens of the Member States. Regulations, for example, which are directly applicable within Member States (Art. 189 EC), or the Council and Commission decisions which bind particulars (Art. 189 EC), are clearly an evidence of the Union legal power.

The argument of the internal legal personality would state that the Union possesses a legal capacity within the internal legal order of each Member State. The Founding Treaties had clearly stated that the Communities have in every Member State the legal capacity recognized to the moral person by national legislations. As such, they can purchase or sell real estates or personal properties (Articles 6 ECSC, 211 EC, and 185 Euratom), or enter into contracts especially for the recruitment of personnel who they are engaging under their responsibilities.

The argument of the international legal personality would refer to the European Court of Justice which had clearly ruled in *Commission v. Council* that the statement of the Treaties according to which "the Community has a legal personality" (Articles 6 ECSC, 210 EC, and 184 Euratom) includes specially the "international personality" of the Communities (*See* ECOJ, 31 March 1971, *Commission v. Council*, case 22/70, Rec. 262). The Court reasoned that the formal recognition of the legal personality of the European Community under Article 210 EC embodied this meaning, that with regard to external relations, the Community enjoyed the capacity to enter into engagements with third States within the objectives defined in the second part of the Treaty. And the Court stated that in order to know whether the Community had the competence to conclude international engagements, the Treaty as a whole must be taken into consideration as well as its material provisions; for such a

competence did not only result from an explicit attribution given by the Treaty, but also from other provisions of the Treaty, and from various acts taken by the Institutions of the Community (*See* ECOJ, *id.* at 263). Now, since the European Community was merged with the European Union, and the European Community was endowed with legal personality, and the Union's legal personality is formally recognized under the Constitutional Treaty, the Union then takes place among the subjects of international law, meaning that it is entitled to use all the means that may help it carry out international activities, such as the right to conclude treaties, the right to legation, the right to pledge action before international jurisdiction, and the right to become member of an international organization. Of course, this personality that the Constitutional Treaty explicitly recognizes to the Union cannot be imposed on third States. The effective exercise of its international capacities supposes the recognition of the European Union as an international person by third States and international organizations.

10. We have shown so far that the European Union is an international organization explicitly endowed with legal personality under the Constitutional Treaty, and that the nature of the personality with which the Union is endowed is internal, international, and union legal personality. We still have to show what the nature of the European Union is.

## **2. Nature of "European Union"**

11. There is no question then that the Union is a legal entity. There is no question either that it is also a political entity. For the Constitutional Treaty has as part of its phraseology a determination of the peoples of Europe to be "united ever more closely."<sup>7</sup>

12. During the debates in the intergovernmental conference on Political Union, held in Rome on December 14, 1990, and which resulted in the Treaty on European Union, most States wanted to describe the European Union's political entity as federal. The term "federal," however, at the instigation of the

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7- See the Preamble of the Constitutional Treaty ("the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny"). See also the Preamble of the Protocol to the Draft European Constitution on the Application of the Principles of Subsidiarity and Proportionality, where the Member States of the Union wished "to ensure that decisions are taken as closely as possible to the citizens of the Union."

United Kingdom, was replaced by "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe..." (Article A(2), Common Provisions). Should it be inferred from this that the Union is federal or non-federal?

13. Several features normally found in a federal system are also present in the European Union:

**Policy responsibilities.** Similar to a federal system where there is a clear and balanced distribution of responsibilities between central and regional levels, also in the European system important policy responsibilities are exercised at both the Union and the States levels. This is clear from the Principle of Subsidiarity,<sup>8</sup> which means that the Union, contrary to the Principle of

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8- The word subsidiarity is derived from the Latin word *subsidiarius*. It has its origins in Catholic social teaching. It is presently best known as a fundamental principle of European Union Law. The principle was established in the 1992 Treaty of Maastricht, and is contained within the proposed new Treaty establishing a constitution for Europe. The principle was developed in the encyclical *Rerum Novarum* of 1891 by Pope Leo XIII, as an attempt to articulate a middle course between the perceived excesses of *laissez-faire* capitalism on the one hand, and the various forms of totalitarianism, which subordinate the individual to the state, on the other. The principle was further developed in Pope Pius XI's encyclical *Quadragesimo Anno* of 1931 and *Economic Justice for All* by the National Conference of Catholic Bishops.

Mentioned in the Preamble of TEU, and made applicable by Article B, last paragraph, Common Provisions, to all the EU, the Principle of Subsidiarity is formulated under Article 5 of the Treaty Establishing the European Community (consolidated version following the Treaty of Nice, which entered into force on 1 February 2003, as follows:

In areas that do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by the scale or effects of the proposed action, be better achieved by the Community.

The present formulation of the Principle of Subsidiarity is contained, with no substantial changes to the previous version, in Article I-11(3) of the Constitutional Treaty of 2004, as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Conferral of competences whereby the Union can only act within the limits of the competences conferred on it to attain the objectives set out in the

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The idea of the Principle of subsidiarity can be reduced to the question of how the Union should act, and is closely linked with the question of whether the Union should act. The Union is limited to taking action that seeks to achieve an objective which cannot be sufficiently achieved by Member States, and which can be better achieved by the Union, "by reason of the scale or effects of the proposed action." The principle according to which the Union must not act unless an objective can be better realized at the Union level than at the level of Member States, had already been in germ under Article 5 ECSC, implicit under Article 232 EEC, and had expressly been mentioned under Article 130R(4) of the SEA of 1986 which authorized the Community to take action "relating to the environment to the extent to which the objectives of [environment policy]...can be attained better at Community level than at the level of the individual Member States."

The idea of the principle of subsidiarity as provided under Article I-11(3) of the Constitutional Treaty is different from that provided under Article 130R(4) SEA. Article 130R(4) established a kind of competition between the Member States and the Community who exercises its competence provided that its action be more efficient than that of the individual Member States, even if the action taken by the latter states were deemed "sufficient" or "efficient." The Constitutional Treaty, however, confers upon the Union a secondary role by which the Union cannot intervene unless the action taken by the Member States is deemed "insufficient." In this context, Article I-11(3) Constitutional Treaty must be read in conjunction with the assertion made by the Preamble of the Constitutional Treaty which institutes a European Union in which decisions are taken as closely as possible to the citizen. Furthermore, the possibility of Union intervention seems limited because its action is qualified more "efficient" only "by reason of the scale or effects of the proposed action." The system, then, is based on the idea that the "exercise" of competence goes, in principle, to the Member States, unless the Union "proves" that its intervention is justified according to the criteria and conditions defined. National competence is thus presumed, absent to the contrary any reasoned motives presented by the Union. On the other hand, it is evident that the principle of subsidiarity applies only to the "shared competences," and not to the "exclusive competence" of the Union. But competitive competence leads to progressive exclusion of national competence. Therefore, the principle of subsidiarity is also conceived as a means to progressive inclusion of Union power, and progressive harmonization or approximation of different national laws.

Thus, the Principle of Subsidiarity is a regulatory principle rather than a constitutional principle. It is a principle that regulates the exercise of competences, and is not an attributive principle out of which one may deduce a list of national and/or Union competences. The principle of subsidiarity does not draw a clear rigid line between the Union and national competences. Rather, it allows organization for every field falling within competitive competences, of a division which actually varies in time according to the circumstances and necessities of the objectives set forth for the Union.

Constitution, can act beyond these limits if action by the Union is deemed necessary to attain one of the objectives set by the Constitution. National competence is, then, similar to a federal system, the rule, and the Union competence the exception.

**Central Judicial Body.** Similar to a federal system, where a central judicial body rules on who-does-what disputes between the federal and federated states, also in the Union System a central judicial body (the Court of Justice) has the authority to rule on who-does-what disputes between the European and the Member States. An indication of this is also the Principle of Subsidiarity on the basis of which the Union's Court of Justice defines the distribution of responsibilities between the European and the Member States.

**Union Citizenship.** Similar to a federal system where a common citizenship defines one people belonging to one State, also the Constitutional Treaty establishes a Union Citizenship with "every national of a Member State shall be a citizen of the Union." (Article I-10(1))

**Principle of Supra-nationalism.** One of the main characteristics of the European Union is that its decisions have a binding force. These decisions constitute the European Union Law which takes precedence over national law should the two conflicts, and which, in the event of a dispute, finds its final authority in the interpretation provided by the Union's Court rather than in that provided by national courts.

**14.** Although several features normally found in a federal system are also present in the European Union, several other features, however, found in a non-federal are also present in it:

**Origin of the European Union.** The European Union finds its origin and status in a treaty which is an act falling within international law and not in a constitution as is the case in a federal state which is an act falling within national law.

**Member States as Subjects of International Law.** Contrary to a federal system, where the Member States relinquish to the federal state their capacity to act as subjects of international law, the States members of the European Union have kept their full capacity as subjects of international law, except with regard to the obligations they engaged themselves in the treaties. Article I-10(1) which is cited above to show a federal aspect of the Union can also be cited here to prove a non-federal aspect of the Union. For after stating that "every national of



a Member State shall be a citizen of the Union,” Article I-10(1) states that “Citizenship of the Union shall be additional to national citizenship and shall not replace it.”

**15.** The ambiguity of the European Union’s nature is also manifest in “the use of Union competences” which “is governed by the principle of subsidiarity.”<sup>9</sup>

On one hand, the principle of subsidiarity may lead to progressive exclusion of Union centralism. It was originally instituted with the aim of ensuring that decisions are taken as closely as possible to the citizens, as to protect them from excesses of central power. As introduced in the Union Law, this principle must logically favor Member States and regions vis-à-vis the Union whose action should be only subsidiary to national and regional authorities. It is in this line of thought that Denmark in its unilateral declaration which has accompanied its adhesion and which was affirmed by the European Council of Edimbourg of 11 and 12 December 1992, asked among other reforms the effective application of the principle of subsidiarity.

On the other hand, the principle of subsidiarity may lead to progressive inclusion of Union centralism. For there is some doubt about the efficiency of the principle of subsidiarity preserving the attributions of the Member States. Having been applied in Germany for more than one century now, the Principle has rather contributed to strengthen the prerogatives of the Bund to the detriment of those of the Länders. Transposed to the Union which could well have certain likenesses with Germany, it cannot but worry those who are still attached to the sovereignty of the states.

The Principle of Subsidiarity which is yet indispensable to better understand the federalist development of the Union, is increasingly being associated with democracy, since decisions are taken as closely as possible to the citizens. Thus, it is not astonishing that the importance of the Principle has been reaffirmed by the Constitutional Treaty.

**16.** From what has been said, then, we have shown that the European Union is both legal and political, displaying both federal and nonfederal characteristics.

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9- Article I-11(1) states as follows: “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.”

## CONCLUSION

**17.** The European Union, uniquely, has not had to fuse different states into a single entity, and then to construct the union. Differently, the sense of union has been experienced progressively, from the embryonic French-German form to the developed entity that it has become, ultimately to be crowned with a constitution.

**18.** Uniquely, the Europeans can freely declare: "We the peoples of the European Union"; indeed, they have experienced the Union. For how is it possible that the American Constitutional Convention created the basic law in Philadelphia in 1789 for a nation that did not yet exist? And how is it possible that the Charter of the 'United' nations was shaped at the Congress of nations in San Francisco in 1945, for a world nation that did not yet exist?

**19.** The unification of the World, be it presented under the guise of globalization or democratization, must be modeled on the European experience. Experiencing the sense of a world union should pave the way for 'the peoples of the United Nations' to declare a 'United Nations'.